

**RULES
OF
THE TENNESSEE ETHICS COMMISSION**

**CHAPTER 0580-1-2
ACCESS TO PUBLIC RECORDS OF THE TENNESSEE ETHICS COMMISSION**

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STAFF DRAFT FOR COMMISSIONER REVIEW

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0580-1-2-.01 PURPOSE AND SCOPE.

These rules are promulgated for the purpose of providing procedures to allow access to those records of the Tennessee Ethics Commission that are within the definition of public records in the Tennessee Public Records Act, T.C.A. §§ 10-7-501, *et seq.*; and are not within any exception, privilege, court decision, statute, common law principle, or other provision of law that excludes the public record from being available for inspection and copying by members of the public. These rules are additionally promulgated for the purpose of implementing and establishing fees to be charged for reproduction of records or for the development of records in a specific format.

0580-1-2-.02 DEFINITIONS.

- (1) Act. The Tennessee Public Records Act, T.C.A. §§ 10-7-501, *et seq.*
- (2) Commission. The Tennessee Ethics Commission.
- (3) Executive Director. The Executive Director of the Tennessee Ethics Commission.
- (4) Non-routine Copy. A copy, whether of paper or of electronically stored data, which, to be made, requires more than minimal staff assistance, e.g., odd or oversize pages, bound documents which must be disassembled before copying and reassembled after copying, an unusually large number of copies, or manipulation or retrieval of electronically stored data.

Generalized concerns have been expressed by the Coalition for Open Government and the Lobbyist Association that the draft of the public records rules expands the Public Records Act, and that these rules would therefore exempt those records which are currently required to be public, or would in some other manner allow the Commission to act in contravention of, or outside of the spirit of, the Public Records Act. This is an incorrect reading of the law. The Public Records Act itself makes exempt from its provisions documents that are made privileged or protected from disclosure by law other than the act itself (see, e.g., Swift vs Campbell, 159 S.W.3d 565). Thus, the exceptions listed under the foregoing definition of "public record" are already recognized by state law, and are therefore already recognized by the Act and are not required to be listed in the rules. The advantage of listing certain exceptions in the rules is to insure that both the staff and the public are aware of the review of protected information which occurs whenever records are requested; e.g., as stated in a Tennessee Bar Journal on the Public Records Act: "...it is incumbent upon the records custodian, in consultation with legal counsel, to determine if a record is open or subject to public inspection or whether it falls within the scope of the 'unless otherwise provided by state law' exception of T.C.A. §10-7-503(a) (last clause)." Thus, the advantage of including a definition for "public record" is that it provides greater direction; the disadvantage is that it could be perceived as demonstrative of an attitude by the Commission which seeks to limit access rather than to facilitate it. Because the Commission must comply with the Public Records Act regardless of whether exceptions are listed in the Commission rules, and because such listing is a cause of concern for the public, this portion of the definition has been deleted from the draft:

- (a) Public Record. For purposes of this Chapter, any record of the Commission that is within the

definition of public records in the Act, that is not within any exception, privilege or other provision of law that excludes the public record from being available for inspection and copying by members of the public, and is therefore required to be made available to a member of the public for inspection and copying.

- (6) Record. For the purposes of this Chapter, any data and/or documents developed and maintained by the Commission, on paper, magnetically, or electronically, on a single computer or computer system, whether on disk, tape or otherwise, or that have been received and are maintained by the Commission, during the normal course of the Commission's activities. A Record may or may not be a Public Record.
- (7) Routine Copy. A copy, whether of paper or of electronically stored data, which, to be made, requires minimal staff assistance, e.g., pages which are either 8½ x 11 or 8½ x 14 and can be automatically printed from electronically stored records or automatically fed into a standard copier. Any Public Records, even if stored electronically or magnetically, shall not be deemed Routine Copies if it is necessary to print the copies of the Public Records by means of a separate screen-print for each individual page of the Record.

Authority: T.C.A. §§4-5-201 et seq., 3-6-107; 10-7-503 and 10-7-506; *Tennessean v. Electric Power Board of Nashville*, 979 S.W.2d 297 (Tenn. 1998); and Op. Tenn. Atty. Gen. 01-021 (Feb. 8, 2001).

The following sections, "Requests for Access to Records" and "Requests for Reproduction of Records" do not contain any rules which are required by law. The Public Records Act grants to the Commission "...the right to adopt and enforce reasonable rules governing the making of such extracts, copies, photographs or photostats." (T.C.A. §10-7-506(a)). The following sections set forth basic procedures for access to and reproduction of Commission records. The rules are intended to tell the public how to make a request, to tell the Commission staff what steps they are to take upon receiving the request, and to provide the requestor with certain notification rights if the staff is denying or modifying the request. The Commission has the legal right, however, to set such policy outside the rulemaking process, and these sections appear to have caused a general state of nervousness amongst those whom the Commission regulates. Accordingly, these sections have been edited in order to streamline the procedures and lessen any confusion about the Commission's intentions regarding the Public Records Act.

0580-1-2-.03 REQUESTS FOR ACCESS TO OR REPRODUCTION OF ~~TO~~ RECORDS.

- (1) A request to the Commission for access to or reproduction of Public Records may be made in person, via telephone, via e-mail, postal mail, or facsimile transmission. and shall identify with reasonable specificity the Public Record, set or system of Public Records which are being requested.
- (2) Before providing access to or reproduction of the requested Public Record, Commission staff shall review the requested Record or Records as quickly as reasonably possible, consistent with the availability of appropriate staff and with regard to the scope of the records request, and make an assessment of the status of the Records and the scope of the request.
- (3) Upon review, Commission staff may redact any such data or information prior to release of the record, or portion of the record, that it has reason to believe has or may have confidential, privileged or otherwise protected material in the record that is subject to the Tennessee Public Records Act.
- (4) If it appears from the Commission's review and assessment that access to and/or reproduction of the record, or the system of records, cannot be immediately provided then the Commission shall so inform the individual making the request and shall provide a reasonable approximation of the time that will be required to comply with the request:

Authority: T.C.A. §§4-5-201 et seq., 3-6-107; 10-7-503 and 10-7-506; *Tennessean v. Electric Power Board of Nashville*, 979 S.W.2d 297 (Tenn. 1998); and Op. Tenn. Atty. Gen. 01-021 (Feb. 8, 2001).

0580-1-2-.04 FEES AND COSTS FOR REPRODUCTION OF PUBLIC RECORDS.

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- (1) Routine Copies shall be charged at a minimum of Twenty-Five Cents (\$0.25) per one-sided page and Thirty Cents (\$0.30) for a two-sided copy.
- (2) Non-Routine Copies shall be charged at a minimum of Fifty Cents (\$0.50) per one-sided page and Sixty Cents (\$0.60) for a two-sided copy.
- (3) The Commission shall not be required to reduce the originals so that more than one sheet of an original is copied onto a single side of a copy. In any event, all copies shall be made by Commission staff and no original Public Records shall be placed in the custody of the person making the request.
- (4) The Commission may charge for all costs reasonably incurred in reproducing the Public Records, regardless of whether the Public Records are determined to be "Routine" or "Non-Routine." The costs of reproduction shall include the following:
 - (a) Commission staff time, paper and other products and rental fees, including, but not limited to, the costs of:
 - (i) Staff time utilized in copying the Public Record;
 - (ii) Paper or other products such as copy toner or toner cartridges, inks, electronic or magnetic media including, but not limited to floppy disks or compact disks etc., or any per copy charges incurred by the Commission on any rented equipment;
 - (iii) Development costs of computer programs and applications, including, but not limited to the creation of a new or modified computer program or computer application that is necessary to put the Public Records in a readable and reproducible format or in a specific reproducible format that is requested by the person or entity seeking copies of the Public Record. In such case, the costs of staff, contractors, consultants, or specialists' time that is required for the production of the program or application and the costs of any new or modified software or hardware necessary for the production of the records may also be charged by the Commission as costs of reproduction of the record;
 - (iv) The costs for delivering the Public Records by mail or any other delivery services or any other mechanisms, electronic, magnetic or otherwise; and
 - (v) Any other costs associated with actually reproducing the requested Public Records, except those out-of-pocket or staff time costs associated with locating or gathering the Public Records.

(5) Computing Personnel Costs.

- (a) The time of any Commission staff associated with providing access to or the reproduction of the requested Public Records shall be charged at the hourly rate for the staff person's position, including the cost of any overtime that is necessary to reproduce the Public Record.

Concern was expressed regarding the legality of rules which would charge fees for staff time when providing copies. The Public Records Act itself states: "...the lawful custodian of such records shall have the right to adopt and enforce reasonable rules governing the making of such extracts, copies, photographs or photostats." [T.C.A. §10-7-506(a)]. The Supreme Court would not allow NES to charge its costs incurred notifying customers, because this activity was an internal policy, not an act which was reasonably required in order for NES to "make" the copies; however, the court specifically stated that "those actual costs incurred by NES for disclosing the material requested by The Tennessean are recoverable under this statute." In addition, the courts and the Attorney General have also noted that agencies may not charge a fee which would amount to a fee for inspection (e.g., which would place a financial barrier to the public's right to inspect). The

Commission can, however, charge the requestor the actual costs incurred in reproducing the record; see, e.g., Tenn. Op. Atty. Gen. No. 01-021: "If the agency had rules in place under T.C.A. § 10-7-506(a) and could demonstrate that the fee covered part of its costs in making extracts, copies, photographs or Photostats in response to a public records request under T.C.A. § 10-7-503, then the fee should be upheld."

The Commission has the discretion to not include in the rules any provision for personnel costs. From a public relations viewpoint there is an advantage to not including such costs, and there is also an advantage to staff in that computing such time and costs can be cumbersome. On the other hand, any such costs would then have to come from the Commission's budget, including large public records requests from for-profit entities (for example, a request from a media outlet to inspect and copy every local filing).

Another option is to charge only for contractors, consultants or specialists (e.g., anyone who is not otherwise on Commission staff).

- (b) The hourly rate is that established by the Commission of Personnel for the staff person's position, or the rate determined by dividing the staff person's gross monthly salary by one hundred sixty-two and one-half (162.5) hours, whichever is greater.
 - (c) Contractor or Consultant Costs. The costs of a contractor or consultant's time shall be charged at the unit rates charged to the Commission pursuant to the Commission's existing contract or any contract made necessary due to the copy request.
 - (d) Specialist Costs. The costs of a specialist's time shall be charged at the costs invoiced to the Commission for those services related to the reproduction of the record.
- (6) Copying by Requesting Person or Entity.
- (a) The Executive Director may, in his or her discretion, permit the individual requesting the record(s) to supply the necessary equipment and supplies to make the requested copies where the records are housed or located for purposes of the records request.
 - (b) In the event that the person making the request reproduces the Public Records, the Executive Director may, in his or her discretion, waive all or any portion of the costs associated with such reproduction as computed in accordance with the provisions of this Chapter.
 - (c) The Executive Director may, in his or her discretion, require that Commission staff observe the reviewing process permitted by this paragraph for the purpose of protecting the integrity of the Public Records, and the costs of staff time necessary for this purpose may be charged pursuant to this Section.

Concern was expressed regarding the level of Executive Director/staff discretion contained in the rules. The rules have been modified to limit such discretion by modifying or eliminating those provisions which are not explicitly, legally necessary or directly necessary for the functioning of the office.

In addition, a provision was added for payment in cash when paying for a limited number of copies.

- (7) Prior to copies being made, or prior to developing a specific format for the reproduction of Public Records, payment in full must be made to the Commission. Payment shall be made by cashier's check or money order made payable to the Tennessee Ethics Commission, and be delivered to the Commission's office; provided, however, that amounts equal to or less than Ten Dollars (\$10.00) may be made in cash..

Authority: T.C.A. §§4-5-201 et seq., 3-6-107; 10-7-503 and 10-7-506; *Tennessean v. Electric Power Board of Nashville*, 979 S.W.2d 297 (Tenn. 1998); and *Op. Tenn. Atty. Gen. 01-021* (Feb. 8, 2001).